IN THE

SUPREME COURT OF THE UNITED STATES

NO. A-489 82-5989

WINFORD L. STOKES,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Questions Presented

I. Whether the imposition of capital punishment when written notice of aggravating circumstances was given prior to any proceedings in the trial, and the jury did not consider the aggravating evidence on punishment until over three days later, after a hearing, violated petitioner's rights to effective assistance of counsel, trial by jury, to "maintain a plea of not guilty," due process of law and the Eighth Amendment's prohibition against cruel and unusual punishment?

II. Whether the state trial court's exercise of its discretion in permitting the late endorsement of witnesses, whose names defense counsel had been provided with in police reports and whose testimony was susceptible of contemplation or innocuous, when that late endorsement was not the result of any intentional act on the part of the prosecuting attorney, tainted petitioner's conviction by prejudicing his cause, or violating any rights secured to petitioner by Amendments V, VI, and XIV of the United States Constitution?

III. Whether the imposition of capital punishment in the case at bar violated the rule set forth in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), regarding mitigating evidence, and petitioner's due process or equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution, when petitioner requested to offer as evidence in mitigation a prior plea bargain for the instant offense which was inadmissible under the rules of evidence of the State of Missouri?

IV. Whether the imposition of capital punishment in the instant cause violates due process, equal protection or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner has a substantial history of serious assaultive criminal convictions, as permitted by § 565.012.2(1), RSMo 1978, given the evidence presented of petitioner's prior convictions for homicides, armed robberies and armed criminal action?

V. Whether the imposition of capital punishment in the instant case violates due process, equal protection, or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner had committed an offense which was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind, as permitted under § 565.012.2(7), RSMo 1978, given the evidence presented during the guilt phase, and considered by the jury during the punishment phase of the bifurcated proceeding, as to the extent of injuries inflicted upon the victim by the petitioner and the circumstances of the crime?

VI. Whether the imposition of capital punishment in the instance cause violates due process, equal protection or constitutes cruel and unusual punishment following a finding by the jury beyond a reasonable doubt that petitioner committed the offense of capital murder for the purpose of receiving money or any other thing of value as permitted by § 565.012.2(4), RSMo 1978, given the evidence presented of petitioner removing property of the victim following the murder, such as the victim's car?

VII. Whether the imposition of capital punishment in the instant cause following a finding by the jury beyond a reasonable doubt that petitioner was an escapee from custody at the time of the offense as permitted by § 565.012.2(9), RSMo 1978, given the evidence presented in the form of a judgement of sentence and conviction for the offense of escape, which was admissible under the laws of the State of Missouri and would be admissible under the federal rules of evidence?

VIII. Whether the imposition of capital punishment in the instant cause violates the petitioner's right to equal protection of the law and constitute cruel and unusual punishment by having the sentence imposed upon him affirmed by the Supreme Court of Missouri in the same procedural manner as this court has passed upon for the State of Georgia, and whether the procedure in the State of Missouri is sufficient to guard against arbitrary or capricous imposition?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions Cited

Rules of Procedure Cited

Secondary Authorities Cited

STATUTORY PROVISIONS

The Missouri statutory scheme for imposition of death penalty is comprised of several statutes. § 565.006, RSMo 1978, provides in pertinent part as follows:

> "...2. Where the jury or judge returns a verdict or finding of guilty as provided in Subsection 1 of this section [finding of capital murder], the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hearing additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolle contendre of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible....In capital murder cases, in which the death penalty may be imposed by a jury or a judge sitting without a jury, the additional procedure provided in § 565.012, shall be followed..."

Section 565.008, RSMo 1978, provides that:

> "1. Persons convicted of the offense of capital murder shall, if the jury were so recommends after complying with the provisions of Sections 565.006 and 565.012, be punished by death."

Section 565.012, RSMo 1978, delineates the circumstances under which capital punishment may be imposed. In pertinent part, it reads as follows:

> "1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions for the jury to consider:
>
> (1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,
>
> (2) Any of the statutory mitigating circumstances enumerated in Subsection 3 which may be supported by the evidence.
>
> (3) Any mitigating or aggravating circumstances otherwise authorized by law.
>
> 2. Statutory aggravating circumstances shall be limited to to the following:
>
> (1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious and criminal convictions;...
>
> (4) The offender committed the offense for capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;...
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved

torture, or depravity of mind;...

(9) The capital murder was commited by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;...

(11) The capital murder was committed while the defendant was engaged in the perpetration or attempt to perpetrate the felony of rape or forcible rape or the felony of sodomy or forcible sodomy;...

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed."

Section 565.014, RSMo 1978, places upon the Missouri Supreme Court the duty to review all death sentences. Section 3 of the statutory provision provides in part as follows:

"3. With regard to the sentence, the Supreme Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(2) Whether the evidence supports the jury's or judge's findings of a statutory aggravating circumstances and enumerated in § 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The offense of first degree murder in the State of Missouri is defined by § 565.003, RSMo 1978, and encompasses the following conduct:

> "Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the prepetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or kidnapping."

The offense of capital murder is defined in § 565.001, RSMo 1978, as follows:

> "Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder."

STATEMENT OF THE CASE

At the outset, respondent takes exception to the continuous barrage of misstated facts and insults directed to the State of Missouri, St. Louis County Prosecutors, and Missouri courts, trial and appellate, which find no basis or support in law or fact. One example of petitioner's apparent attempt to mislead this Court is his suggestion that he languished in jail for over a year before counsel was appointed when he is aware of his representation by counsel, on a capital murder in the City of St. Louis, Missouri, and any delay in appointment of counsel in the instant murder was occasioned by the proceedings in the City of St. Louis, Missouri on that capital murder and related charges. A cursory review of the record in this cause will establish that the State, its prosecutors and courts have acted in an appropriate and constitutional manner in each step of the proceedings as dictated by this Court. No further response shall be made to misstatements except as necessary in the argument portion of this response as the record speaks for itself.

Charges against the petitioner arose out of the following events: On February 18, 1978, a Saturday, the petitioner was staying with one Darlene McCauley at the Northwestern Hotel in St. Louis City, Missouri on Natural Bridge Road. Petitioner joined Darlene and her boyfriend, Wilbert Daniels, to go to a bar. Daniels met with Darlene and the petitioner at approximately 3:00 p.m. on that date and the three had dinner at the Heritage House, they then went to a bar called

"Some Place Else", arriving between 8:30 and 9:00 p.m.. They secured a table close to the dance floor, ordered drinks, and Daniels danced with Darlene. When later orders for drinks were delayed, petitioner went to ask the waitress to come to the table, he was later seen dancing with the victim, Pamela Benda, of University City, Missouri. Miss Benda returned to the table with petitioner and introduced herself. She joined the group and they imbibed several rounds of drinks. At 11:30 p.m., Daniels and Darlene were prepared to leave and announced they would have one last drink. The petitioner and Daniels went to the restroom together and petitioner informed Daniels that he would catch a ride home with Miss Benda. Upon returning to the table, Miss Benda confirmed this arrangement. Petitioner remained with Miss Benda as Darlene and Daniels left. Ramona Tabron Stokes, then petitioner's wife, was not with the threesome that evening.

On that same date, February 18, 1978, the record established that Miss Benda had recently rented an apartment at 6600 Washington in the City of University City, Missouri, specifically apartment 303. Between 2:30 and 2:40 a.m., on the following Monday, Officer David Kloeckener, of the University City Police Department was summoned to 6600 Washington, where he was met by a Mr. Aburto (the manager of the apartment building), and Mr. Hunsicker, (a maintance man). Officer Kloeckener had responded to a call for a possible sudden death. The manager unlocked the door to apartment 303 and motioned Office Kloeckener to a back bedroom where he discovered the nude body of Ms. Benda

with a pillow over its face. Officer Kloeckner then summoned other officers to the scene.

Detective William Kranz, of the University City Police Department, responded to Officer Kloeckener's call. He examined the scene and found it in a disarray with a nude body in the bedroom. Photographs of the scene were taken and the apartment was dusted for fingerprints. Several items of physical evidence were seized. Fingerprints were recovered from an ornamental brass headboard, a cosmetic box on the dresser, a closet door in the south bedroom, and from a Whitmore Scotch whiskey bottle on the floor. Certain items were also seized from the commode in the bathroom.

An autopsy was performed on the victim's body on February 22, 1978, at 7:00 a.m. by Dr. Eugene Tucker, a pathologist in the Office of the Medical Examiner of St. Louis County, Missouri. It was discovered during the autopsy that the victim's body had already passed through rigor mortis The victim weighed 110 pounds and was 5'2" tall. Dr. Tucker discovered the following wounds during his examination of the body. A shallow incision, over the left upper chest just beneath the clavical, approximately 2 inches in length, one and one-half inches wide, and just cut beneath the skin; a cut on the back right of the hand; a cut on the surface of the hand; a deep cut over the back of the victim; a large cut in a posterior aspect of the lower third of the right arm which measured three inches in length, one-half inch wide, and two inches deep extending to the bone; a large area of bruising that was slightly raised and purple over

the left side of the chest; a large bruise internally over the left side of the chest; numerous bruises and abrasions on both sides of the neck, some irregular, a number of odd-shaped bruises, and also bruises in a straight line running around the neck and posterior aspect of the victim's neck; the right side of the victim's lips were swollen and dark purple; dried blood was present in, and outside of, the nose; several scrapes or abrasions were present on the face, on the right side of the nose and another on the right temple; multiple areas of hemorrhage within the neck muscles; areas of fresh hemorrhaging in the thyroid gland; areas of hemorrhaging in the larynx; one of the angles of the hyoid bone had been recently broken; abrasions over the back and over thesacrum, which was a "rather large abrasion"; a superficial one-fourth inch deep cut into the subcutaneous fat on the right chest in the shape of a round puncture; and a slight abrasion to the right knee. The body showed evidence of liver mortis, which develops as the blood settles or sinks toward the lower portion of the body. An examination of the victim's vagina resulted in the discovery of a "slight amount of whitish-grey material", which, upon being tested, was found to contain numerous spermatozoa. Enzyme studies were conducted and indicated the presence of enzymes associated with seminal fluid. Nine milligram percent of alcohol was found in the victim's urine. Dr. Tucker testified that, in his opinion, and based upon his examination of the body, the cause of death was due to manual strangulation although an apron had been applied to the neck, as indicated by linear

abrasions. The cuts appearing on the victim were fresh, and the victim had been dead more than 1 day at the time of the autopsy. The examination of the vagina, and the presence of spermatozoa, indicated that the victim had had sexual intercourse sometime within six hours of death. The injury to the left area of the chest was received while the victim was alive as the condition of the resultant bruise could only have been achieved by the action of the heart's pumping.

Evidence was also adduced that the petitioner was seen driving the victim's brown duster prior to his leaving for South Bend, Indiana, on March 3, 1978, by his then wife, Ramona Tabron (Stokes) and her girlfriend. Ms. Tabron last saw this automobile in February 1978, in front of the Northwestern Hotel where the appellant was staying with Darlene. The appellant gave to Ms. Tabron a watch pendant during February, just prior to the couples' leaving for South Bend, Indiana. Miss Tabron and petitioner left for South Bend, on or about March 3, 1978, and stayed for about two weeks prior to the appellant's arrest. Ms. Tabron had sold the pendant to a lady who owned an antique shop in South Bend, Indiana.

Two University City detectives, Earl Shelton and Frances Wright, traveled to South Bend, Indiana, and were permitted to speak to the petitioner after having been met by a Lt. Mahank of the South Bend Police Department. The two officers arrived in South Bend at approximately 2:00 p.m. on March 5, 1978. Petitioner was brought to the detectives to speak to them as they had a "pickup order" out for the petitioner.

Petitioner was given his Miranda rights in the form of a written document (Exhibit No. 53), which he signed, filling in the date and time as well as an acknowledgement of each right.

Petitioner, when brought to the officers at the South Bend Police Department stationhouse, was informed of the investigation. He read out loud and acknowledged each right on the form and then signed it. Petitioner agreed to talk to the officers and was shown two photographs of the victim and asked if he had ever seen her before. Petitioner said that he did not know the woman in the photograph. When asked if he had ever seen her before, he stated that he had not. When asked if he had been at the lounge "Some Place Else" and danced with a white woman, he said he'd never been to the lounge and did not dance with "any white woman".

Petitioner was then shown the pendant and stated that he had never seen it before. When informed that his wife had told the officers that she had received the watch from the petitioner, he denied it. Petitioner continued to deny that he knew anything about the watch, but then suddenly stated that he had seen the watch and purchased it in St. Louis for a sum of $20.00 from a man he did not know in the last part of February or early part of March. He said he purchased the watch in a hotel room and his wife was a witness. The petitioner told the officers that a Harold King had introduced him to the man who sold him the watch.

Upon further questioning, petitioner denied that he had ever been in the victim's apartment. When told that his

fingerprints had been found in the victim's apartment, the petitioner admitted that he had been to the apartment at that particular time. He stated that on a weekend night, he, Darlene McCaulley, his wife , and a "Bill" were in an apartment in a hotel in St. Louis. He stated that they all decided to go to some lounges, but his wife did not want to go. Miss Tabron was dropped off at her mother's and the threesome traveled to the "Some Place Else" lounge. At this lounge, the petitioner met and danced with the victim. Petitioner left with the victim separate from Darlene and Bill at closing time. The petitioner also told the police that the victim had said it was okay to go pick up his wife even though she had asked, "Your place or mine?", petitioner's wife came out of the residence where they picked her up with two men that the petitioner did not know. They all got into the car with the victim and went to a big building. Petitioner stated that the victim made a call from her apartment and, about seven minutes later, two white women arrived and the group partied until about 5:00 a.m. At that time, Miss Tabron said that she was a little sick so the petitioner took her downstairs and out back of the building to the victim's car. As this car was unlocked the two got inside to get out of the cold. Petitioner told officers that about 30 minutes passed and the two men came out, one with the keys to the car. They got inside and drove petitioner and his wife to the Northwestern Hotel where they were dropped off. Petitioner also stated that the next day (Sunday) one of the

men came back and asked if he wanted to keep the car for a few days, giving petitioner the keys. Petitioner drove the duster automobile a few days until the man returned. He told officers that this man had attempted to sell the car several days later, but petitioner refused to buy.

When petitioner was told by officers that they would check his story with Harold King the petitioner said that would not be necessary as that was not what happened. He then told a third version of the events of the evening of February 18, 1978, which was as follows: Darlene, her boyfriend and petitioner went to a lounge, but Ramona would not go with them so she was left at the apartment. The three went to the Some Place Else Lounge, and, again, the victim was already there. Petitioner spoke with her and danced with Ms. Benda, deciding to remain with the victim when his two companions stated they were going to leave. The victim said she would take the petitioner back to his home in the City. After Darlene and her boyfriend departed, the victim and the petitioner drove to the hotel where they picked up the wife, and all three drove to the big building, again going into the victim's apartment where they began drinking. Petitioner stated that he and his wife were getting high on "reefers" and the victim asked the petitioner to go to bed with her. Petitioner said that he turned her down as his wife was in another part of the apartment, and the victim began to strike him with her open hand. Petitioner then stated that he "went off" and started striking her and knocked her down. He did not recall what he did next, but

that his wife was standing beside him saying, "Let's go." He told officers that he wanted to look at the victim and determined that she was not breathing. He stated then that he and his wife searched the apartment, he taking a man's ring, and the keys to the victim's auto as well as the auto itself. He stated his wife apparently took the watch because she showed it to him the next day Sunday. Petitioner said that he sold the man's ring, and, although he intended to give the watch to Darlene, decided to "give it" to his wife. He stated that he left the victim's automobile at the hotel. When asked if he realized he was implicating his wife in murder, petitioner replied yes. He was asked to repeat his statement before his wife following her being giving the Miranda rights form and signing it. Ramona Tabron denied the truth of the statement when she testified at trial.

Fingerprints taken from the petitioner in South Bend, Indiana, were compared to several fingerprint lifts from the apartment taken on February 22, 1979. It was determined that the fingerprint lift from a scotch bottle was the left index finger of the appellant; the fingerprint lift from the brass bed headboard was the right ring finger of the petitioner; a fingerprint left on the Scotch bottle was the right ring finger of the petitioner; and the fingerprint lift from the cosmetic box on the top of the bedroom dresser was the right thumb of petitioner.

The petitioner adduced no evidence in his own behalf in the guilt phase of this trial.

Prior to the submission of the case of the jury and out of its hearing and presence, the applicability of Missouri's Habitual Offender Act was determined in the event the jury returned a verdict of guilty of a degree of homicide less than capital murder. The jury retired to consider its verdict on October 24, 1979, and returned a verdict of guilty of capital murder on that same date. The jury was polled, and each member of the jury responded that the verdict was his own. The court then stood in temporary recess, until the following morning, October 25, 1979, for the second phase of the bifurcated trial proceeding.

During the second phase of the trial, the state adduced evidence of prior convictions of appellant, namely appellant's conviction of manslaughter (Exhibit 24); appellant's guilty plea to murder second degree and robbery first degree (Exhibit No. 76); petitioner's plea of guilty of escape before a conviction (Exhibit No. 77); petitioner's guilty pleas to robbery first degree and armed criminal action (Exhibit No. 78); and petitioner's conviction for robbery first degree by means of a dangerous and deadly weapon (Exhibit 79). The petitioner presented no evidence on his own behalf although prior to the commencment of the second phase he had requested of the trial court whether or not he could bring in the plea agreement which had not been carried out by the petitioner on September 20, 1979. This was denied. On appeal, petitioner complained of not being permitted to introduce evidence of another's motive and opportunity to murder Ms. Benda. No complaint on appeal was made of the ruling to murder Ms. Benda.

No complaint on appeal was made of the ruling regarding the plea arrangement.

After closing arguments of the parties, the jury retired at 12:05 p.m. to their deliberating room. At 1:40 p.m., the jury requested the exhibits having been introduced as new evidence in the second phase. These were provided to the jury, and the jury returned with the verdict, fixing petitioner's punishment at death and finding four aggravating circumstances, specifically: (1) that the petitioner had a substantial history of serious assaultive convictions; (2) that petitioner murdered the victim for the purpose of receiving an item of monetary value or money; (3) that the murder of the victim involved torture or depravity of mind, and as a result thereof, it was outrageously or wantonly vile, horrible, or inhuman; and (4) that the petitioner had escaped from the lawful custody of a place of confinement, at 3:05 p.m. on that same date. As already noted, petitioner's motion for new trial was overruled and he was sentenced to death in accordance with the jury's assessment on January 17, 1980. Petitioner prosecuted an appeal to the Missouri Supreme Court which then affirmed his conviction on August 31, 1982. His rehearing was denied on October 7, 1982, by that court. (Petitioner for writ of certiorari Appendix A). Petitioner now seeks a writ of certiorari in this court.

ARGUMENT

I.

The following claims of petitioner are raised for the first time in his petition for a writ of certiorari: that his guilty pleas to murder second degree, armed robbery and escape are invalid and inadmissible, that he was not permitted to introduce as mitigating evidence a plea agreement, and effective assistance of counsel. Thus respondent suggests that this court should not entertain these grounds.

The judgement of death imposed upon petitioner DID not violate petitioner's right to effective assistance of counsel, trial by jury, "maintain a plea of not guilty", due process of law in the Eighth Amendment's prohibition against cruel and unusual punishment as petitioner was given sufficient written notice of aggravating circumstance evidence to be presented at trial as three days passed before any instruction on aggravating evidence was given to the jury, before the second phase of the bifurcated proceeding commenced there was an evening recess which would have permitted petitioner an opportunity to rebut any evidence which he felt necessary to rebut, no secret information was used in obtaining the sentence of death against petitioner, petitioner had been informed a month in advance that the state was going to seek a death penalty, and each item of evidence introduced in aggravation of punishment was such that petitioner cannot say that he was surprised in the legal sense of the word nor prejudiced as he was aware of each item of evidence.

In his petition for certiorari, petitioner complains about the type of notice he was given of aggravating circumstance evidence. Petitioner received formal notice of the aggravating circumstances prior to any proceeding in his trial. The type of notice is not disputed here, nor was it disputed at any time in the courts below in the State of Missouri. The petitioner desired, apparently, more notice than he received. However, petitioner does not show any prejudice because of the lack of such additional notice, or of what benefit, if any, additional time would have been to him. The statutory scheme in Missouri, as outlined under statutory provisions set forth supra, requires that notice be given prior to trial. Notice was given prior to trial and petitioner was afforded the opportunity to rebut evidence throughout the entire trial, including both phases, as said evidence was offered. This petitioner chose not to do which is his right. Also, petitioner was permitted to "maintain" a guilty plea and was tried before a jury. Respondent fails to see how these rights have been infringed.

Petitioner suggests that the circumstances in the instant case are no less egregious than those presented in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in which the death sentence had been imposed upon the petitioner on the base of confidential, secret information and the presentence report which was not disclosed to counsel or the defendant at any time. They were not given an opportunity, at any time, to refute or deny the contents of that report. Respondent suggests to this Court that petitioner's reliance

upon Gardner v. Flordia is misplaced as Gardner v. Florida has been cited and relied upon for the proposition that there must be an opportunity to rebut evidence in aggravation and such nondisclosure violates due process and the Eighth Amendment prohibition against cruel and unusual punishment and that Gardner v. Florida's holding prohibits the use of "secret information," Proffitt v. Wainwright 685 F.2d 1227, 1254, (11th Cir. 1982).

The instant cause is not the type of case as was presented to this court in Smith v. Estelle, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), affirming Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), in which the prosecuting attorney had intentionally omitted the crucial witness from the list of those to be used in the penalty phase and had given defense counsel nothing which they could use to cross-examine the expert witness. Because of the surprise and disadvantage worked by the evidence presented at the time of the penalty phase of the proceedings, the Fifth Circuit found that there was no reliability in the penalty phase and reversed the sentence.

In the instant cause, petitioner was informed three days before the penalty phase of what evidence would be used in aggravation. Petitioner has never denied that the judgements offered of convictions were his, and has advanced for the first time in his petition for certiorari that the validity of some of those judgments, used in aggravation, depended upon a negotiated settlement and that the judgements are invalid. As petitioner is aware, the State was willing and ready to go

through with its negotiated settlement. However, petitioner demanded a jury trial after having accepted the benefits of his bargain by having the capital murder charge in the City of St. Louis, Missouri, reduced to murder second degree with a term of years. Petitioner demanded a jury trial in this particular capital murder case and has never attacked the validity of his pleas entered in the City of St. Louis, although represented on appeal by a different attorney.

It is also obvious that, whether or not the State was willing to reduce the charge against the petitioner in a murder second degree, is irrelevant as to whether or not notice as to evidence in aggravation was not given properly. Indeed, as this Court has previously held, it does not violate any constitutional rights of a defendant to try and have him convicted of a greater offense that that offered in a plea bargain, with a more severe sentence. Bordenkirchner v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Since there is no per se rule against encouraging guilt pleas, Corbett v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), respondent suggests that all claims of petitioner that the fact that the plea bargain was offered is irrelevant as to whether or not the imposition of capital punishment in the instant case was arbitrary or capricious as it is not the prosecutor who imposes the sentence of death, but rather a jury following a statutory procedure which is similar, if not identical, to that scheme and procedure previously examined by this court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Also, no secret evidence was used against this petitioner. What was used were prior convictions of which he certainly had notice. This is not a case of pre-prosecution vindictiveness as petitioner was well aware of what would occurr if he did not plead guilty to murder second degree in the St. Louis County capital murder case. Thus, no constitutional right of petitioner was infringed upon by the state attorney. United States v. Mauricio, 685 F.2d 143 (5th Cir. 1982), (reversed dismissal of indictment for vindictiveness as defendant aware of consequences if plea agreement fails).

Additionally, respondent would suggest that the claims contained in the argument I portion of petitioner's petition for writ of certiorari are irrelevant to the question presented as to whether or not sufficient notice of a gravating circumstance evidence was given. This is particularly so with petitioner's allegation that there was no fair warning that he was facing a capital offense after having negotiated a plea to have the capital offense reduced to murder second. (Petition at page 7). As petitioner had a jury trial, petitioner's attorney effectively cross-examined all witnesses presented by the state and could not have rebutted the evidence of the convictions as they were petitioner's own, petitioner received the second phase hearing on his punishment after three days notice of the evidence which would be used against him, and the procedureal safeguards set forth by this Court were followed, respondent suggests that petitioner has suffered no violation of his federal constitutional rights which would justify a granting of a writ of certiorari for the review of his sentence of death.

II.

The judgement of death is not violative of petitioner's constitutional rights as secured by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by the late endorsement of 25 witnesses, only five of whom were called to testify, as the testimony adduced through the mouths of the newly endorsed witnesses was susceptible of contemplation or innocuous and there was no element of surpise nor substantial or significant factor in this case brought about by the testimony of these witnesses which was not previously disclosed to defense counsel through discovery.

In his second point under which petitioner requests that a writ of certiorari be granted, petitioner alleges that the state trial court improperly refused to allow a continuance which was unopposed by the State. First, respondent would suggest that trial court exercising its discretion in whether or not to grant a continuance is not a matter for federal review as this is a procedural matter to be considered by the state courts. Secondly, petitioner must show some type of prejudice as the result of any late endorsement without a continuance. This is the standard applied in federal prosecutions when there is a late endorsement of witnesses. See McClendon v. United States, 587 F.2d 384 (8th Cir. 1978), cert. denied 440 U.S. 982, (1979) (error in administering discovery rules not reversible absent material prejudice due to late endorsement of witnesses).

In McClendon v. United States, supra, defense counsel moved for a continuance that he could prepare to meet the testimony of late endorsed witnesses. As there was no element of surprise, and the testimony of which he would not have known prior to trial was not substantial or a significant factor in the case, no reversal was required. So too was the ruling in United States v. Duhart, 496 F.2d 941 (9th Cir. 1974), cert. denied 419 U.S. 967 (1974) (no prejudice for failing to comply with statute to supply list of witnesses in capital case if have knowledge going to be called and what they will say). In United States v. Duhart, defense counsel knew the testimony to be produced from witnesses due to police reports and information he had received in discovery.

In the case at bar, it is not disputed that petitioner's counsel had received every name endorsed as a late witness in police reports. Defense counsel's motion for a continuance, which was requested after several other pre-trial motions were filed by him and ruled on by the court following the filing of the late endorsement, was denied as they were currently in trial and were ready to go to trial. The list of additional witnesses was shown to have originally been attached to an earlier charging document but had been left off that document through a court employee's clerical error. There was no dispute at trial, nor on appeal, that any bad faith was involved on the part of the state. Any claim of bad faith is raised for the first time in petitioner's petition for writ of certiorari.

The Supreme Court of Missouri considered the question as if only five witnesses had been endorsed as the result of an earlier holding in State v. Ross, 507 S.W.2d 348 (Mo. 1974), in which it was determined that an endorsement of a witness, who is not called to testify at trial, who does not result in any prejudice to an appellant's rights and does not entitle him to a reversal of his conviction. In the case at bar, only five of the late endorsed witnesses testified, specifically, Lucy Malone, Ramona Tabron Stokes, Myrna Savoldi, Robert Benda, and Wilbert Daniels.

The first witness to testify, who was called twenty-four hours after the filing of the new accusatorial document with the list of witnesses on it, testified regarding the ownership of the victim's car and identified the car from the photograph, as did Mr. Benda, the victim's former husband. Both witnesses were cross-examined by the defense counsel regarding the ownership of this vehicle. Wilbert Daniels testified about being at the Someplace Else Lounge with the petitioner at the time that he met the victim. The testimony regarding the ownership of the victim's car as well as the date and time at which petitioner met the victim should have been readily contemplated by petitioner as these facts were contained in his confession to the police.

Myrna Savoldi testified as to having seen a knife similar to a knife found in the commode of the victim's apartment. She was cross-examined by petitioner's counsel and admitted that she could not identify the knife. Thus, petitioner was able to meet this woman's testimony.

With respect to his former spouse, Ramona, petitioner cannot seriously state that he did not contemplate or expect that Ms. Tabron would be called to testify as immediately after the substitute information was filed, his counsel filed a written motion to strike the testimony of Ms. Tabron as having been married to the petitioner at the time of the commission of the offense. Obviously, as the motion had been prepared, counsel expected this testimony to be introduced and could not have been surprised or disadvantaged by same. Respondent suggests to this Court that petitioner was in no way prejudiced by the exercise of the discretion of the trial court in first permitting the late endorsement of witnesses and denying a continuance as his attorney was able to cross-examine these witnesses, should have expected this testimony to be admitted, this testimony was in every way cumulative to that of officers testifying about petitioner's confession and what was contained therein, and he actually expected Ramona Tabron to be called as a witness as he had already prepared a written motion to strike her testimony.

Petitioner is correct in his assertion that Hall v. United States, 410 F.2d 653 (4th Cir. 1969), cert. denied 396 U.S. 970, 90 S.Ct. 455 (1969), contains a statement that, generally, in a capital case, failure to provide a list of witnesses is ordinarily reversible error. However, Hall v. United States was not reversed. Rather, there it was noted that "the purpose for which the list is usually required was otherwise met..." in that case as defense counsel had the

transcript of the witnesses testimony from a prior trial. Therefore, he was "not suprised and denied an opportunity to prepare to examine witnesses and meet their testimony." The purpose of the rule to provide a list of witnesses is to avoid surprise. As there was no surprise or prejudice to the appellant Hall's case, his cause was not reversed. Just as in Hall v. United States, petitioner was aware of the type of testimony to be introduced by these witnesses and was in no way prejudiced by any late endorsement. Thus, a writ of certiorari should not be granted as a result of this claim.

III.

The judgement of death is not violative of any of petitioner's constitutional rights as it was not imposed in violation of the rule set forth in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as the evidence offered in mitigation by petitioner, a prior plea bargain for the instant offense which was inadmissible under the rules of evidence of the State of Missouri, did not prohibit him from introducing any evidence relating to his character or any of the circumstances of the offense that the peittioner wished to proffer as a basis for a sentence less than death.

Petitioner suggests that an offer of a plea negotiation is evidence of mitigation for purposes of avoiding the imposition of the death sentence. Respondent suggests that this position would result in no offer of a plea bargain to any defendant faced with the possiblity of a death sentence and is inappropriate evidence to "mitigate" the type of

punishment which a defendant's character, or record, or circumstances of the offense would dictate he should receive under the Missouri statutory scheme for imposition of the death sentence. Respondent contests petitioner's assertion that the jury would consider an offer of a plea agreement as a mitigating circumstance as sufficient to preclude the ultimate penalty of death. Rather, respondent would suggest to this Court that the fact that petitioner was willing to plead guilty to a lesser offense without the benefit of trial would have the opposite result--the jury would think that the petitioner was guilty and any possible doubt of guilt would be removed from their minds.

The public interest would best be served by not interfering with the role of the plea bargain in criminal prosecutions by requiring that any offer of a plea bargain be told to the jury. Respondent suggests to this court that Missouri statutory scheme requiring only that mitigating evidence be admissible under the rules of evidence ensures the reliability which petitioner demands in the sentencing phase of his bifurcated proceeding. Lockett v. Ohio, supra, only requires that evidence of his character, record, or circumstance of the offense that would be a basis for sentence less than death be admitted. A plea negotiation entered into because of a crowded criminal docket or because the defendant himself might request the possibility of a plea bargain is irrelevant to his character or record or any circumstance of the offense and is therefore improper mitigating evidence standing on its own. Additionally, this evidence is inadmissible under

the rules of evidence of Missouri, State v. Beal, 470 S.W.2d 509, 514 (Mo. banc 1971), (the State of Missouri has ruled that pretrial negotiations are inadmissible for any purpose unless the defendant subsequently enters a guilty plea or a plea of nolle contendre). Petitioner's plea negotiation was inadmissible.

Respondent suggests to this court that rulings on evidentiary grounds are not normally reviewable in a federal proceeding and do not present a federal question. Oliphant v. Koehler, 549 F.2d 547 (6th Cir. 1979). Respondent suggests to this court that it is entitled to require reliability in mitigating evidence the same as the defendant is entitled to require reliability in the evidence of aggravation.

IV.

The judgement of death is not unconstitutional nor was it imposed in an arbitrary or capricous fashion, as the jury's verdict form specifically set out an aggravating circumstance enumerated in § 565.012.2(1) 10, RSMo 1978, which was found by the jury beyond a reasonable doubt, after being presented with admissible evidence of petitioner's prior convictions, including, certain offenses to which he had pled guilty on September 20, 1979.

Petitioner suggests that the aggravating circumstance of substantial history of assaultive criminal convictions, as provided for in § 565.012.2(1) RSMo 1978, is too vague and nonspecific to be applied "evenhandedly by a jury." Respondent suggests to this court that this is just the type of aggravating circumstance that guides the jury and informs

them to consider the record of the particular defendant.

Petitioner has never at any time, in any court of the State of Missouri, attacked the validity of his guilty pleas entered prior to this trial and which were a part of the negotiated plea settlement which he declined to enter when in the St. Louis County Circuit Court although he now does so. Petitioner refused to plead guilty to an offense in St. Louis County following his guilty pleas in the City of St. Louis, did not render those earlier pleas of guilty invalid.

Petitioner is incorrect in stating that he had only the following admissible history: "A manslaughter conviction and a robbery conviction in 1971". Petitioner had a substantial history under any definition of that word. Petitioner had just been convicted of his third homicide offense, having been found guilty of every degree of murder in the Missouri statutory scheme except first degree. Petitioner had numerous robbery convictions as well as armed criminal action. An individual who has committed three homicides, numerous armed robberies and armed criminal action is certainly one with a serious assaultive criminal conviction history. Respondent suggests to this court that this aggravating circumstance is not highly subjective and is one of the aggravating circumstances which is more easily applied to a particular defendant's records and is sufficient to guide a jury's determination on the question of punishment.

Respondent suggests further that the aggravating circumstance of substantial history of assaultive criminal convictions is not vague and does not need a more distinct definition despite the holding of the Georgia Supreme Court in Arnold

v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976). In Arnold v. State, the Georgia court looked to Black's Law Dictionary for a defintition of what "substantial" was. They found it defined there to mean something of value or real worth and importance. Id. Respondent suggests to this Court that the lay mind, which is what would be present in the jury box would not use the definition contained in Black's Law Dictionary, but would rather use the common meaning of the word such as would be found in a Webster's dictionary. The New World Dictionary, second college edition, defines substantial as having substance, real, actual and true and not imaginery, strong, solid, firm, stout, considerable, ample and large, as well as the definitions of considerable worth or value in having property or possessions. Clearly, the lay mind would understand substantial in the context of the aggravating circumstance to mean considerable, ample, real, actual, true and not imaginery. Respondent suggests to this Court that two prior homicide convictions, as well as several armed criminal actions, is indeed a "substantial" history as that description would be viewed by the lay juror's mind. This is certainly an ample or large amount of criminal convictions involving assaults upon other human beings. This is not a too vague and non-specific aggravating circumstance to meet constitutional muster.

V.

The judgment and sentence of death imposed against petitioner is not violative of any constitutional right preserved to him by the United States Constitution as the aggravating circumstance that the "offense was outrageously,

or wantonly vile in that it involved torture or depravity of mind" is not unconstitutionally vague or overbroad as it sufficiently guides and focuses the jury's objective consideration to the individual offense and the indivdual offender before it and has been interpreted by the Missouri Supreme Court in a constitutional manner.

Petitioner alleges, just as under argument 4 of his petition, that the aggravating circumstance contained in subsection 7 of § 565.012.2, supra, is unconstitutionally vague. This particular aggravating circumstance has already been reviewed by this Court in Gregg v. Georgia, supra. As is noted in Gregg v. Georgia, permitting the jury to act within the current statutory language alone, without further definition will permit a lein to be maintained between contemporary community values and the judiciary, without which the imposition of punishment will cease to reflect evolving community standards. Gregg v. Georgia, __ U.S. __, 190 (discussing importance of role of jury in capital sentencing procedures). As pointed in Gregg v. Georgia, supra at 201, this court is permitted to alloco state court's the opportunity to define and narrow further the aggravating circumstances. Such has been done by the Missouri Supreme Court given this particular aggravating circumstance. As may be seen by a review of the opinion of the Supreme Court in the instance cause, it lists, just as the Georgia Supreme Court does, those cases which are found to be similar and which it compared to the instant cause. State v. Stokes, 638 S.W.2d 715, 724 (Mo. banc 1982). It has been the consistent procedure followed

by the Missouri Supreme Court. State v. Mercer, 618 S.W.2d 1 (Mo. banc 1981), cert denied ___ U.S. ___ (1981); State v. Shaw, 636 S.W.2d 667 (Mo. banc 1982) and State v. Bolder, 635 S.W.2d 673 (Mo. banc 1982). Specifically, the Missouri Supreme Court in great detail described the injuries inflicted upon Pamela R. Benda, which were inflicted while the victim was still alive. As the victim was repeatedly cut, often deeply, bruised and strangled, the crime was considered to be of an outrageous and horrible nature. The Supreme Court of Missouri has followed the procedure which was found constitutional by this Court in Gregg v. Georgia, supra. Respondent suggests that petitioner is not entitled to a writ of certiorari on this aggravating circumstance.

VI.

The judgement of death imposed against petitioner in the instant cause is not violative of any constitutional rights as the aggravating circumstance that petitioner committed the offense of capital murder for himself for purposes of receiving something of monetary value, as provided for in § 565.012.2(4) of the Missouri statutory scheme, is not constitutionally vague, nor was it applied to petitioner in a manner not forseen by the Missouri legislature at the time of its enactment. Petitioner alleges as his sixth point of his request for a writ of certiorari that the murder was committed to receive something of monetary value or money clearly is meant to refer to contract murder or murder for hire because any other meaning applied to it would make it first degree murder. First of all, respondent would

point out that the fact that an aggravating circumstance would also constitute an act which would be a felony which could support the conviction of first degree murder under § 565.003, RSMo 1978, if the killing was unintentional, does not indicate that the legislature did not intend this to be a situation warranting the use of this aggravating circumstance.

With respect to whether or not an aggravating circumstance, which also might be considered a "first degree murder" under the Missouri statutory scheme, respondent would point out that aggravating circumstances now include the situation where the perpetrator kills while attempting to rape or sodomize his victim. Clearly, under § 565.003, RSMo 1978, an unpremeditated killing during the commission of a rape is first degree murder. However, what separates killing one to receive money or any other thing of monetary value from a murder committed during the robbery or any other act which would be a felony is the fact that the killing is premeditated. This situtation does amount to an objective standard as the aggravating circumstance will never be triggered unless the jury has first found the element of deliberation and premeditation. Once that element is found, and the jury moves onto the sentencing phase of trial, it is guided to consider the motive behind the murder. Certainly, this is the type of standard by which one should judge the defendant as to whether or not he should be exposed to the penalty of death as he has assigned a monetary value to life which is repugnant to this society's values. This situtation is not inherently misleading and is not arbitrary as it guides the jury into considering the motive behind the murder.

VII.

The judgement of capital punishment in the instant cause is not violative of any of petitioner's constitutional rights as the aggravating circumstance that petitioner was an escapee at the time of the murder was supported by admissible evidence upon which the jury could find beyond a reasonable doubt that petitioner was an escapee at the time of the murder, and this aggravating circumstance sufficiently limits the imposition of the sentence of death so as not to violate the Eighth Amendment prohibition against cruel and unusual punishment.

Contrary to petitioner's assertion in his petition at page 25, the judgment resulting from a guilty plea of petitioner that he was an escapee at the time of the commission of this instant capital murder was admissible. A certified copy of said judgment was introduced into evidence and there was no objection from petitioner at that time that it was inadmissible. Such a judgment would be admissible in a federal proceeding Fed.R.Evid. 902(4). At no time prior to this petition being filed in the United States Supreme Court has petitioner ever asserted that the judgments entered against him for prior convictions were invalid for any reason. Respondent suggests that it is inappropriate for him at this time to suggest that an aggravating circumstance was not supported by the evidence on a theory that the evidence was inadmissible because it was part and parcel to a plea agreement which petitioner refused and failed to carry out. If these judgements were in any way tainted, it was not on the part of the state

and the state has no authority to set aside the guilty pleas which were entered into evidence. Petitioner sufficiently satisfied with the guilty pleas entered in the City of St. Louis, Missouri, to allow same to stand for over a two year period. Respondent suggests that petitioner's complaint about these convictions on the theory that they are not valid because petitioner did not enter a guilty plea to a cause in another county in circuit court finds no basis in fact or law.

With respect to this particular aggravating circumstance, this Court has always held, and has been understood to have stated, that the purpose of the aggravating circumstance is to create a meaningful distinction between the case wherein a death penalty may be imposed without being done so arbitrarily from those caes where it is not to be imposed. Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 973 (1976). The aggravating circumstance itself is not sufficient to justify imposition of the death, but serves as a threshhold requirement to consideration of the penalty. Such was the case in Spinkinlink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), rehearing denied 441 U.S. 937 (1979). Respondent suggests first that the Missouri statutory scheme properly guides and focuses the jury's objective consideration of the individual offender and the individual offense prior to imposition of a death penalty. See Jurek v. Texas, 428 U.S. 262, 274, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Respondent suggests further that allowing the jury to consider

whether or not petititioner was an escapee at the time of the offense is just such an appropriate aggravating circumstance to trigger the jury's consideration over whether or not petitioner's character and the crime would justify capital punishment. As may be seen by an examination of the Missouri statutory scheme, the jury does not have to impose death even if it finds an aggravating circumstance beyond a reasonable doubt. Thus, petitioner's apparent assertion that the fact of being an escapee at the time of the crime is insufficient and renders the penalty disproportionate to the crime ignores the fact that once this aggravating circumstance is found, the jury may consider the various facets of the defendant's character such as this is his third homicide conviction and that he has numerous armed criminal action convictions.

VIII.

The judgement of sentence of death imposed upon petitioner does not violate the constitution prohibition against cruel and unusual punishment or equal protection as the Missouri statutory scheme, as enforced by the Missouri Supreme Court, sufficiently guards against capricious imposition of the penalty of death.

Petitioner suggests to this Court that the Missouri Supreme Court and its trial courts have failed to apply the safeguards in such a way as to avoid arbritary and capricous imposition of the death penalty. Petitioner would also state that the "tears of jurors in St. Louis County attest to this fact" and they should cease. However, there is no evidence or anything in the record, which would indicate

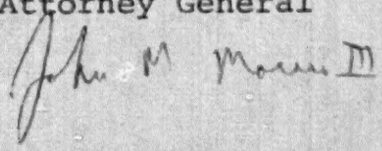
that the jurors of St. Louis County are crying. Rather, the record is replete with examples of the Supreme Court of Missouri reviewing the petitioner's death sentence and comparing it with other cases, considering whether or not there was any evidence to support aggravating circumstances, considering whether or not this sentence was disproportionate to other sentences imposed in this state, and in short, fulfilling duty under § 565.014, supra. The Missouri Supreme Court reviews death penalties in the same manner that the Georgia Supreme Court reviews death penalties. Said procedure was found constitutionally sufficient in Gregg v. Georgia, supra. Petitioner advances no reason for this court to review its decision in Gregg v. Georgia, supra, and respondent suggests to this Court that there is none. Thus petitioner is not entitled to review by means of a writ of certiorari.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



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